

Environmental Regulatory Update: State Action, Federal Exemptions, Spill Reporting, Superfund Cleanup

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IMPACT OF COVID-19 ON ENVIRONMENTAL COMPLIANCE

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Agenda

- Overview of Federal and State COVID-19 Enforcement Policies/Guidance
- Impacts on Specific Regulatory Programs
- Other Potential Defenses to COVID-19 Non-Compliance
- Best Practices for Mitigating Environmental Non-Compliance Risks Due to COVID-19 Pandemic

OVERVIEW OF FEDERAL AND STATE COVID-19 ENFORCEMENT POLICIES/GUIDANCE



COVID-19 Pandemic Likely to Adversely Impact Even the Most Robust EHS Compliance Programs

- Despite best planning, the COVID-19 pandemic has severely strained many companies' existing EHS compliance programs
 - Absences due to illness or remote work arrangements for employees with subject matter expertise or specialized skills
 - State and local “stay at home” orders
 - Supply chain disruptions
 - Inability to obtain services of outside contractors (specialized sampling, waste handling, laboratory analyses, etc.)
 - Reliance on paper or non-accessible electronic storage and transmission

U.S. EPA: COVID-19 Implications for EPA's Enforcement and Compliance Assurance Program

- Policy issued March 26 2020; retroactive application to March 13, 2020
- April 2, 2020: U.S. EPA clarifies that compliance is the expectation
- If compliance is not reasonably practicable due to COVID-19, regulated entities must:
 - Act responsibly under the circumstances to minimize the effects and duration of any noncompliance caused by COVID-19
 - Identify the specific nature and dates of the noncompliance
 - Identify how COVID-19 was the cause of noncompliance and document the decisions and actions taken in response, including best efforts to comply and steps taken to come into compliance at the earliest opportunity
 - Return to compliance as soon as possible
 - Document the information, action, or condition specified above

U.S. EPA: COVID-19 Implications for EPA's Enforcement and Compliance Assurance Program

- Types of violations addressed:
 - Compliance monitoring
 - Integrity testing
 - Sampling
 - Lab analysis
 - Training
 - Reporting
 - Certification
- Monitoring/reporting at less than three-month intervals does not need to be “caught up”
- Imports/criminal violations not subject to the “Policy”

U.S. EPA: COVID-19 Implications for EPA's Enforcement and Compliance Assurance Program (cont'd)

- Release reporting must continue
- Violations involving “acute risks and imminent threats” must be immediately reported
- Violations resulting in increased emissions must be reported immediately to relevant state or U.S. EPA authority

U.S. EPA: Interim Guidance on Site Field Work Decisions Due to Impacts of COVID-19

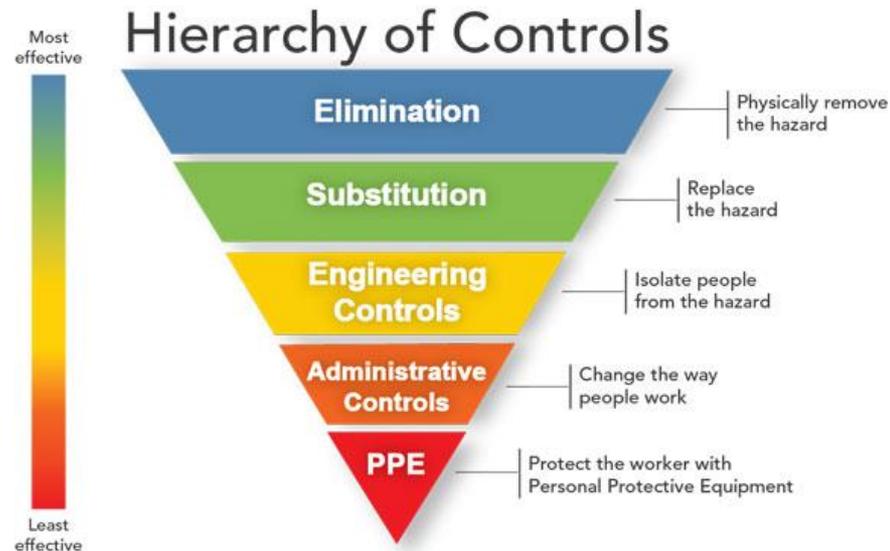
- April 10, 2020: U.S. EPA issued guidance to facilitate field work decisions at RCRA and CERCLA sites
- Interim guidance does not extend compliance deadlines
- Non-field work generally should continue
- Site-specific field work decisions made in consultation with regulators
- Work should continue where:
 - Failure to continue response action would pose an imminent and substantial endangerment to human health or the environment
 - Continuing response actions would lead to a reduction in human health risk/exposure in the next six months
- Factors supporting pause in site work:
 - Continuing work would not yield near-term reduction in human health risk
 - Site workers have tested positive or exhibited COVID symptoms
 - Inability to maintain social distancing

U.S. EPA: Interim Guidance on Site Field Work Decisions Due to Impacts of COVID-19

- As of April 1, 2020, field activities have been paused at about 12% of the NPL sites
- But if field work continues, how can it be done safely?
- EPA's "Interim Guidance" requires a review of a site's Health and Safety Plan to ensure that it adequately accounts for CDC and other guidelines for mitigating COVID-19 risks

U.S. EPA: Interim Guidance on Site Field Work Decisions Due to Impacts of COVID-19 (cont'd)

- March 9, 2020: OSHA Guidance on Preparing Workplaces for COVID-19
- “Elimination” is most effective but infeasible where field work must continue
- “Administrative Controls” and “PPE” most likely control strategies for field work activities



Other Federal Actions

- DOJ suspended collections of stipulated penalties owed under various consent decrees through May 31, 2020
 - Not a blanket suspension-relief offered on an individual basis
- May 19th Executive Order on Regulatory Relief to Support Economic Recovery
 - Directs agencies to scale back existing rules, make permanent temporary waivers, and evaluate other steps to boost the economy
 - Likely to impact timeline and scope of any modifications to U.S. EPA policies/guidance

States

- California

- March 26, 2020: Cal EPA issued its own “enforcement policy”
 - No abdication of enforcement responsibility
- Water Boards and DTSC: all regulations remain in effect and compliance expected
 - Pre-notification of potential COVID-19 compliance issues required
- April 15, 2020 Cal EPA announcement:
 - Will fill EPA “enforcement gaps” and focus on continuity of operations
 - “Regulated entities that cannot meet a specific regulatory requirement due to emergency government orders or a specific hardship must contact the appropriate Board/Office of Cal EPA before falling out of compliance.”
 - Requests must be time limited, specific and define the hardship

States

- Florida
 - Florida DEP issued “emergency order” extending certain enumerated deadlines by 30 days, including some monitoring, but expressly did not alter any of the Department’ “compliance and enforcement activities”
- Georgia
 - Adopted U.S. EPA enforcement policy
- Illinois
 - Illinois EPA issued a “compliance expectation” statement
 - In compliance status directly related to “stay at home” orders, Illinois EPA will exercise enforcement discretion so long as no harm to human health or the environment
 - Case-by-case decision
 - Discretion does not extend to “critical infrastructure”

States

- Pennsylvania
 - “All environmental laws and regulations will continue to be enforced for the duration of the disaster declaration”
 - Procedure to request temporary suspension of regulatory requirements and/or permit conditions: form addresses connection to COVID-19, alternate compliance options, relationship to price gouging or hoarding, plans for reporting, analysis of public health risks and benefits, comparison to others
 - Temporary Suspension Approvals expire June 30 and are published

States

- Texas
 - April 6 Announcement on Enforcement Forbearance
 - No forbearance if fail to report non-compliance
 - Extended some reporting obligations
 - Requests must address duration, contain “sufficient documentation” and include best efforts
 - Exceptions: emissions limits; requirements to “assure safety”, air quality and drinking water monitoring

IMPACTS ON SPECIFIC REGULATORY PROGRAMS



Clean Air Act

- Potential impact on full range of permit and regulatory requirements, ranging from emission monitoring, leak detection, and recordkeeping to emission limits and emissions reporting
- Federal/state overlap
- Enforcement policies relating to monitoring, certification, sampling, analysis, and reporting vs. emissions limits and operating and work practice requirements
- Special considerations for special programs: woodstove compliance extension, work practices requirements (e.g., asbestos NESHAP)

Clean Water Act

- Federal/state overlap
- History of significant citizen suit activity
- Significant role of government-owned facilities, especially wastewater treatment plants
- Policies relating to monitoring, reporting, certification requirements vs. discharge limits
- Special issues: SPCC training; CAFO size categories
- March 31, 2020: Temporary Guidance on NPDES Reporting in Response to COVID-19 Pandemic

SDWA

- Heightened expectations for public drinking water systems
- Highest monitoring priority:
 - Microbial pathogens
 - Nitrates/nitrites
 - Lead/copper
 - Non-compliant contaminants

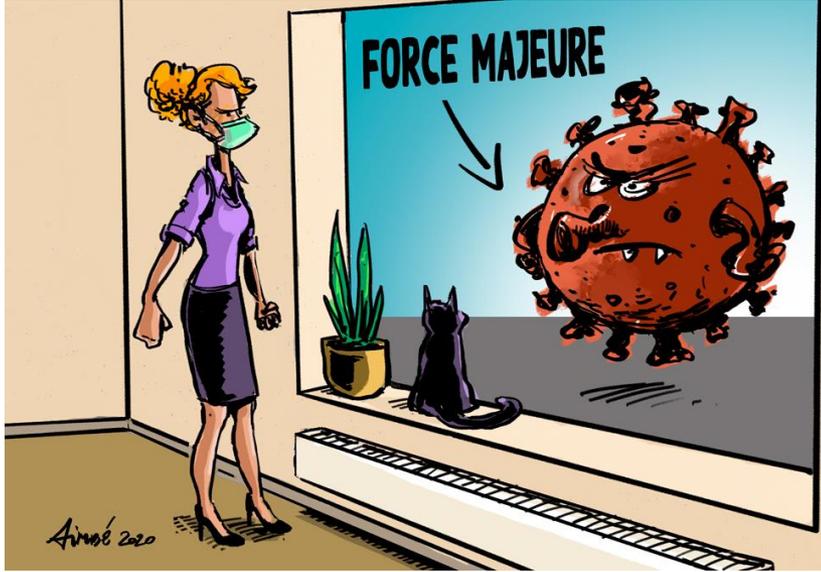
RCRA Hazardous Waste Management

- If waste cannot be transferred offsite within the regulatory time limits, regulated entities should:
 - Continue to properly label and store the waste
 - Follow steps articulated at beginning of presentation
- Failure to timely transfer waste off-site will not result in entity being designed as a TSD
- VSQG and SQG status will be retained
- Flexibility with waste manifest signatures

TRI Release Reporting

- EPA “Policy” recognizes that required TRI reporting “may” be delayed
 - Catch up reporting “not” required for reporting intervals of less than three months
 - Since TRI reports submitted on an annual basis, any missed TRI report must be submitted “as soon as possible” once the Policy is no longer in effect
 - Challenges associated with the addition of 172 PFAS chemicals (by CAS #) requiring initial reports on 2020 manufacturing/importing, processing or otherwise use above the 100-pound threshold, with reports due July 2021

OTHER POTENTIAL DEFENSES TO COVID-19 NON-COMPLIANCE



Force Majeure Provisions

- EPA Model Consent Decree:

“Force Majeure” is defined as “any event arising from causes beyond the control of SDs, of any entity controlled by SDs, or of SD’s contractors that delays or prevents the performance of any obligation under this CD despite SD’s best efforts to fulfill the obligations. The requirement that SDs exercise ‘best efforts to fulfill the obligation’ includes using best efforts to anticipate any potential force majeure (a) as it is occurring and (b) following the potential force majeure such that the delay and any adverse effects of the delay are minimized to the greatest extent possible. ‘Force majeure’ does not include financial inability to complete the Work or a failure to achieve the Performance Standards.”

Force Majeure: Procedural Requirements

- Upon occurrence of any event that may delay performance, notice must be promptly provided (could be within 48-72 hours of knowledge of potential delay)
 - Courts may reject force majeure where requirements not closely followed
 - *United States v. Alshabkhoun*, 277 F.3d 930 (7th Cir. 2002) (rejecting force majeure defense for failure to provide requisite notice for Clean Water Act violation)
- SD must provide follow-up that describes:
 - Reason for delay
 - Steps taken to prevent or minimize delay
 - Steps taken to prevent or mitigate the delay
- Courts retain jurisdiction over consent decree and are ultimate decision-maker on whether COVID-19 legitimately impacted ability compliance

Acts of God, Upsets, Emergencies

- Many state and federal environmental statutes contemplate relief in the event of extreme circumstances such as the COVID-19 pandemic
- CWA
 - Excuses non-compliance with technology based effluent limitations due to “upset condition” (40 CFR §122.41(n))
 - Exception under Section 311(c) for authorized removal of discharges of oil and hazardous substances without NPDES permit to prevent substantial threat to public health or welfare (40 CFR §122.3(d))
- CAA
 - Section 110(f) authorizes President to declare a national or regional emergency during which states can suspend up to four months certain CAA requirements (42 U.S.C. §7410(f))—this authority has not yet been invoked
- RCRA
 - Actions taken in response to imminent and substantial threat exempt from certain statutory requirements (40 CFR § 270.61)

RISKS FOR COMPANIES THAT RELY ON COVID-19 ENFORCEMENT DISCRETION POLICIES

What, Me Worry?



Challenges to EPA Enforcement Discretion Policy

- April 16, 2020: environmental groups file lawsuit seeking declaratory and injunctive relief (*NRDC, et al. v. Bodine*)
 - April 1, 2020: petition filed seeking an emergency order requiring that any entity that ceases monitoring for COVID-related reasons provide written notice and justification to EPA
 - April 16, 2020: complaint seeks to compel U.S. EPA response to April 1, 2020 petition

Challenges to EPA Enforcement Discretion Policy (cont'd)

- May 13, 2020: states filed lawsuit challenging U.S. EPA's enforcement discretion policy (*New York, et al. v. EPA*)
- Lawsuit alleges that U.S. EPA's enforcement discretion policy is:
 - An Ultra Vires agency action
 - An abdication of U.S. EPA's statutory responsibilities
 - Invalid due to U.S. EPA failure to follow notice and comment rulemaking
 - Arbitrary and capricious
- These lawsuits are unlikely to be successful
 - Courts set a high bar for “unreasonable delay” allegations against an agency
 - U.S. EPA has wide enforcement discretion and the policy is not a blanket enforcement prohibition

State Enforcement and Citizen Suits

- U.S. EPA and states have parallel roles in enforcement federal environmental laws
 - States are not bound by U.S. EPA enforcement policy and may elect to bring their own enforcement proceedings, either under applicable state law or as citizens' suits under most federal statutes
 - California Water Resources Control Board: issued alert stating that compliance with its permits is still required and expected

— AND —

- Many federal environmental statutes have citizen suit provisions (CAA, CWA, RCRA)
 - Lack of U.S. EPA enforcement may render regulated entities vulnerable to citizen suit litigation
 - NGOs have signaled intent to closely scrutinize any relaxed environmental discretion

BEST PRACTICES FOR MITIGATING ENVIRONMENTAL NON-COMPLIANCE RISKS DUE TO COVID-19 PANDEMIC



Prepare Early: Regulated Entities Have the Burden to Demonstrate that They Qualify for Relief

- Identify compliance obligations at an early stage
 - Robust EHS management system essential
 - Identify compliance obligations and deadlines
 - Ensure familiarity with modification, notice, and force majeure provisions
 - Review scope of federal, state, and local enforcement discretion policies and guidance

Communication Critical

- Ensure clear lines of communication both internally and externally
 - Internal communications
 - Compliance is the expectation and non-compliance must be the exception
 - Clear reporting chain
 - Clear understanding of parameters of relevant discretion policies, guidance
 - External
 - Consistent messaging with the regulators
 - Establish clear lines of communication between the business and the regulators
 - Communicate early and often

Document, Document, and Then Document Again

- U.S. EPA “Policy” requires documentation to demonstrate that enforcement “discretion” is warranted
 - Document that the circumstances resulting in the non-compliance were COVID-related;
 - Document the efforts that were taken to avoid to avoid the non-compliance and describe why those efforts were not successful
 - Document the efforts that were made come into compliance as quickly as possible
 - Document any communication with regulators
 - If force majeure or other statutory exemption being relied upon, document that any other requirements are present

Other Strategic Considerations

- Attorney-client privilege
 - Privileged communications between lawyers and clients should remain privileged
 - Non-privileged documentation evidencing compliance with requirements in various discretion policies must be available
- Self-disclosure under federal and state self-disclosure policies
 - Regulated entities may still want to consider self-disclosing any COVID-caused violations under applicable policies

Start-Up Checklist

- If facility was shut-down, review applicable permits for any required start-up procedures or notice
- Upon resumption of normal operations, confirm that:
 - All required sampling, testing, or monitoring was performed
 - All required equipment inspections have been completed
 - All required records-keeping obligations were complied with
 - Any hazardous waste that has accumulated beyond the permissible time-limits is manifested off-site promptly
 - All hazardous waste storage areas are inspected
 - Any required spill prevention and control inspections are completed
 - Any required EPCRA reports are prepared and submitted
 - Any required employee training and/or certification is completed

Questions?



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